

NO. 21,105

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In the
UNITED STATES COURT OF APPEALS
For the NINTH CIRCUIT

RPTZ-PATCO, INC.,

Appellant,

v.

PACIFIC INLAND NAVIGATION
COMPANY, INC.,

Appellee.

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

This is an appeal from the April 1, 1966 Judgment (C.T. 118)* of the United States District Court for the District of Oregon adjudging that Claims 1, 6, 8 and 11 of Pickrell patent No. 3,033,150 (PX 1) are invalid. The District Court case, Civil Action No. 63,109, was an action for infringement of the patent.

The jurisdiction of the District Court was admitted by the parties and found in the Pretrial Order, Section III, Paragraph 1, (C.T. 98) and was conferred on the Court by 35 U.S.C., §281:

"A patentee shall have remedy by civil action for infringement of his patents."

and 28 U.S.C. 1338(a):

"The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents. . ."

* As hereinafter used, references to the Clerk's Transcript of the Record are indicated by "C.T."; references to the Reporter's Transcript are indicated by "R.T."; and references to Plaintiff's and Defendant's exhibits are indicated by "PX" and "DX", respectively.

A timely notice of appeal from the District Court Judgment was filed on May 17, 1966 (C.T. 136) within the time permitted by 28 U.S.C. §2107. This Court has jurisdiction of the appeal by virtue of 28 U.S.C. §§1291 and 1294.

STATEMENT OF THE CASE

Parties and Origin of Action

RPTZ-PATCO, INC., the plaintiff in the District Court and hereinafter referred to, alternatively, as PATCO or APPELLANT, is the owner of Pickrell patent No. 3,033,150, the patent in suit. Ownership of the patent by PATCO was a fact agreed to by the parties and found in the Pretrial Order, Section III, Paragraph 2 (C.T. 98).

PACIFIC INLAND NAVIGATION COMPANY, INC., the defendant in the District Court and hereinafter referred to, alternatively, as PACIFIC or APPELLEE, was sued by PATCO for infringement of the Pickrell patent No. 3,033,150 by a Complaint filed in the District Court on March 21, 1963 (C.T. 1). In the Complaint, PACIFIC was charged with the unauthorized making and using of

barges incorporating the invention which forms the subject matter of the patent and the relief asked was an injunction against further infringement, damages [with an increase if the Court was persuaded that the infringement was willful] and reasonable attorney's fees. PATCO designated Claims 1, 6, 8 and 11 as those which were to be relied upon in the District Court to support the charge of infringement in the Interrogatory Answers filed in the District Court February 8, 1965 (C.T. 86).

Following trial, the District Court, on March 31, 1966, filed its Opinion (C.T. 118), incorporating its findings and conclusions that the Letters Patent in suit was invalid, and on April 19, 1966, a Decree of Dismissal (C.T. 134) was entered. This appeal is from the Decree of Dismissal.

The Invention of the Pickrell Patent

Pickrell patent No. 3,033,150, hereinafter referred to as the Pickrell patent, is for a barge comprising a combination of elements interrelated to provide an improved construction capable of efficiently handling multiple cargoes (e.g., grain and

petroleum), either separately or simultaneously. The invention of the patent resides, primarily, in the concept of providing a V-shaped cofferdam in the hull of a barge in such a manner as to separate the hull into an upper self-unloading cargo hold having a lower wall defined by the upper wall of the cofferdam and a lower cargo hold having an upper wall defined by the lower wall of the cofferdam and separated from the upper cargo hold by the void provided between the upper and lower walls of the cofferdam. The claims in suit (1, 6, 8 and 11) all define combinations embodying this basic concept.

Barges constructed according to the invention of the Pickrell patent are characterized in that they may carry efficiently either bulk cargoes, such as grain, salt and the like, or liquid cargoes, such as oil, gasoline, liquid fertilizers; or both types of cargo simultaneously. Bulk cargoes are carried in the hold above the cofferdam and thus, due to the V-shaped lower wall of the hold defined by the upper wall of the cofferdam, "self" or gravity unloading of the bulk cargoes is facilitated. Liquid cargoes are carried in the hold below the cofferdam where they are separated from any bulk cargo which may be contained in the hold above the cofferdam by the walls of the cofferdam and the

void provided therebetween. As a result of the latter characteristic, liquid cargoes are effectively isolated from bulk cargoes to the satisfaction of standard safety requirements, such as the Coast Guard Regulations, and cross contamination between bulk and liquid cargoes is prevented.

The District Court, in its Opinion, aptly described the attributes of the invention as follows (C.T. 118-119):

"The cofferdam operates to keep the dry cargo separate from the space underneath which was designed for liquid storage. The design permits each cargo to extend to the weather deck, thus maintaining a low center of gravity. The V-shaped design for the dry cargo is particularly useful in loading and unloading grain. The cofferdam allows access to the void space from either side of the vessel and a clear view of the entire interior may be had from certain vantage points. . ."

Prior to making the invention of the Pickrell patent, Mr. Hugh E. Pickrell, Jr., the patentee, had been employed since 1946, in various capacities in the construction and maintenance of barges and towboats for the North Shore Boatbuilding Co. and its associated or predecessor companies (R.T. 46-47). During this employment, Mr. Pickrell observed shipping on the Columbia



River and its tributaries and became aware that petroleum was typically loaded on barges in the "Portland Area" and unloaded at its destination, namely, Umatilla, Oregon and at Posco, Washington (R.T. 50). Mr. Pickrell also became aware, during this period, that wheat barges were used on the river (R.T. 51) and realized the desirability of constructing a barge which would be facilitated to carry both, or either, petroleum and wheat. At the trial, Mr. Pickrell stated that "we had always wanted to build a barge that would go in both directions and carry a pay load in both directions and also unload the product in a hurry" (R.T. 53). It was realized that such a barge would avoid the necessity of having different barges for use in shipping grain and petroleum, respectively, and the problems and expense encountered in returning these barges from their destinations in empty condition.

It was with the foregoing background that Mr. Pickrell conceived the invention of the patent here in controversy. He first made a sketch illustrating the concept (R.T. 56) and then, over a period of about two months, worked with Bill Buss, the draftsman for North Shore Boatbuilding, to design a barge embodying the invention (R.T. 58). After the design of the barge, Tide-

water Barge Lines, under Mr. Pickrell's auspices, caused two barges to be built incorporating the invention at an investment of about \$600,000 (R.T. 83-87).

The Art Prior to the Invention of the Pickrell Patent

Prior to the invention of the Pickrell patent, a well developed body of art relating to barges and other vessels designed for the shipment of both single and multiple cargoes existed. Of this art, that pertinent to the invention of the Pickrell patent may be categorized as follows:

I. The gravity unloading dry cargo hold art, as typified by the following:

Barge R-76 (DX 37-2, -3, -4)

Barge R-27 (DX 66 and 67)

Barge R-21 (DX 66 and 67)

Patent 2,889,942 (DX 58)

Patent 1,803,105 (PX 6)

Drawings for the "Sinclair-Petrolore" (DX 2)

II. The cofferdam art, as typified by the following:

Barge "Umatilla" (DX 53)

Patent 2,594,930 (PX 6)

The United States Coast Guard Regulations for

Tank Vessels (PX 25)

The art in category I shows barges having V- or W-shaped gravity unloading dry cargo holds, both with and without sumps for cargo collection purposes. The V- or W-shaped holds shown in this art are defined by single walls, or bulkheads, and certain are designed for the storage of liquid such as ballast water, therebeneath. This art does not, however, make any disclosure of a barge combination employing a V-shaped cofferdam wherein the upper surface of the cofferdam defines a dry or bulk cargo hold and the lower surface of the cofferdam defines the upper wall of a liquid cargo hold. For that matter, this art makes no showing whatsoever of a V- or W-shaped cofferdam.

The art in category II shows, or suggests, the employment of horizontal and/or vertical cofferdams between adjacent cargo holds of a barge. The Coast Guard Regulations forming a part of this art further defined the meaning of the term "coffer-

dam" and the circumstances under which cofferdams are required between adjacent holds. These Regulations, in their appendix, even illustrate exemplary forms of horizontal and vertical cofferdams. There is no teaching, however, in these Regulations or any of the other art in category II of the V- or W-shaped cofferdam, or the desirability of such a cofferdam.

The "Sinclair-Petrolore" overlaps these categories, somewhat, in that its design includes a series of V-shaped single skinned dry cargo holds separated from each other by vertical cofferdams. The cofferdams of this design, however, do not extend below the V-shaped cargo holds, nor are they of V-shape. The District Court appreciated the limited pertinence of this design to the invention of the Pickrell patent when, in comparing the design to the art cited of record against the application for the Pickrell patent, it stated (C.T. 122):

"I find that the citing of the Sinclair-Petrolore would not have added anything to the disclosed prior art; . . ."

The art categorized above represents, as a practical matter, the totality of the prior art teachings pertinent to the invention of the Pickrell patent. No evidence, or testimony, was

introduced at the trial before the District Court to indicate that anyone, before Mr. Pickrell, had ever seen, or conceived of his invention. The absence of the invention from the prior art was made evident from the testimony of APPELLEE's own expert witnesses, such as Mr. Spaulding, a professional naval architect, who testified in cross-examination as follows (R.T. 313):

"Q. In your study of those prior art patents, did you see in any one of them a vessel that had a hull and within the hull a V-shaped dry cargo space with a V-shaped cofferdam beneath it and a space below that within the hull for carrying of liquid cargo?

A. No."

The Judgment of Invalidity

In weighing the claims of the Pickrell patent in issue (i.e., Claims 1, 6, 8 and 11), the District Court treated its judgment as involving four (4) issues, as set forth in the Opinion at (C.T. 120) as follows:

"I. Were those interested in the prosecution of the Pickrell patent, both morally and legally required to call the attention of the Patent Office to the teachings of the barge Umatilla, the 'Russell Patent' and the prior Russell barges?

"II. Would these teachings, and the Coast Guard Regulations, not specifically considered, materially add to the 'prior art' which the Patent Office did consider and would such consideration have resulted in the issuance of a patent, if any, with substantially narrower terms than the claims in suit?

"III. Was the Pickrell patent obvious when viewed in the light of the prior art and the disclosures of the Pickrell patent, within the meaning of 35 U.S.C. §103, as construed?

"IV. When applied to the facts in this case, is the presumption favoring the validity of the Pickrell patent controlling?"

The District Court resolved issues I and II in the negative (C.T. 121 and 123, respectively). Thus, in effect, the District Court held that Pickrell patent was not invalid on the basis of either of these issues.

The District Court resolved issue III in the affirmative at (C.T. 123) as follows:

"Defendant argues that the subject matter of Pickrell and the prior art, including the Coast Guard Regulations, was such that the subject matter as a whole would have been obvious at the time of the invention, to a person having ordinary skill in the art to which said subject matter pertained.4/ I agree."

"4/ 35 U.S.C. §103.

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in §102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.'"

It is upon this conclusion that the District Court based its holding of invalidity with respect to Claims 1, 6, 8, and 11 of the Pickrell patent.

Issue IV is concerned with the presumption of validity afforded a patent under the provisions of the first paragraph of 35 U.S.C. §282:

"A patent shall be presumed valid. Each claim of a patent (whether in independent or dependent form) shall be presumed valid independently of the validity of other claims; dependent

of Mr. Pickrell, were discussed and Mr. Glosten also had access at Pacific's main office to the Tidewater plans for Barge 36 (R.T. 263).

Pacific's plan was consummated by Mr. Glosten in his design of the accused barges. While designing these barges, Mr. Glosten went aboard Tidewater Barge 36 or 37 in Portland where it was being constructed (R.T. 258-259). Mr. Glosten also went aboard one of these barges when it was completed and docked at Umatilla (R.T. 260).

After the design of the accused barges, they were constructed by Gunderson Bros. of Portland. Barge 550 was constructed first, with Barges 551 and 552 following thereafter. In 1963, Mr. Glosten was credited with an article appearing in the Pacific Work Boat Magazine of March, 1963 (PX 14), regarding the success and features of Barges 550, 551 and 552.

The District Court found the accused barges to embody in their construction the definition of the Pickrell invention set forth in the patent claims here in suit (i.e., 1, 6, 8 and 11)

(C.T. 132). In its conclusion regarding infringement, the Court also made findings as to the nature of the infringement, should the claims be held valid on appeal, as follows (C.T. 132):

"If the Pickrell patent is declared valid, then I would have no hesitancy in holding that defendant's barges, built, converted and operated by defendant infringed Claims 1, 6, 8 and 11, of the patent in suit in the specifications as set forth in paragraph 2, subdivisions (a), (b), (c) and (d) on pages 8 and 9 of the pre-trial order; that the acts of infringement were knowingly, willfully and wantonly committed and that plaintiff would be entitled to injunctive relief against further infringements."

The Questions Involved

The only questions involved in this appeal were raised by the District Court's treatment of the issues of obviousness under 35 U.S.C. §103 and the presumption of validity under 35 U.S.C. §282. These issues, as discussed in the foregoing remarks, are set forth as Nos. III and IV, respectively, in the Opinion of the District Court (C.T. 120) and the questions raised by the District Court's treatment thereof may be stated as follows:

1. Did the District Court err in holding the invention defined by Claims 1, 6, 8 and 11 of the Pickrell patent obvious within the provisions of 35 U.S.C. §103 and, therefore, unpatentable?

2. Did the District Court err in over-throwing the presumption of validity which attached to Claims 1, 6, 8, and 11 of the Pickrell patent under the provisions of 35 U.S.C. §282?

SPECIFICATION OF ERRORS

The following errors are specified as those which will be urged to support this appeal and represent a regrouping of the points set forth in APPELLANT'S STATEMENT OF POINTS ON APPEAL (APPENDIX I).

1. The District Court erred:

(a) in concluding that the invention of the Pickrell patent defined in the claims in suit was obvious within the provisions of 35 U.S.C. §103;

(b) in applying a hindsight test and relying on the hindsight testimony of appellee's expert witnesses to arrive at this conclusion; and,

(c) in surmizing the following to support this conclusion:

(1) "the subject matter of Pickrell and the prior art, including the Coast Guard Regulations was such that the subject matter as a whole would have been obvious at the time the invention [sic. "was made"] to a person having ordinary skill in the art to which said subject matter pertained." (C.T. 123);

(2) The "Pickrell device, when viewed in the light of the decision in Cuno, and the provisions of 35 U.S.C. §103, as interpreted in Graham v. Deere Co., supra, does not, in the last analysis, portray anything beyond the work of one merely skilled in his calling." (C.T. 127);

(3) "The creation of such a V-shaped design would not require more ingenuity than that possessed of a mechanic skilled in the art."

(C.T. 130-131); [The Court here had reference to the V-shaped cofferdam employed in the Pickrell invention]; and,

- (4) Pickrell's testimony, "the Russell Barges and the Russell patent made obvious every feature of his design, with the exception of the cofferdam." (C.T. 132).

(This error represents a regrouping of Appellant's points 1, 2, 5, 6, 11 and 17.)

2. The District Court erred in failing to test obviousness under 35 U.S.C. §103 on the basis of obviousness of conceiving the claimed combination (C.T. 127-128). (This error represents Appellant's point 18.)

3. The District Court erred in concluding that the overwhelming weight of expert testimony was that it would have been a fairly simple matter to modify the earlier devices or to combine features well known in the industry and long in use, and come up with a device following the Pickrell design (C.T. 128); and in its following findings which relate to this conclusion:

- (a) "the overwhelming weight of credible evidence is to the effect that there was nothing unique, novel or

extraordinary in the design of a V-shaped cofferdam" and that the Court could well take judicial notice that such was the fact (C.T. 130); and,

- (b) "...on the entire record that the Pickrell device presented nothing that was not obvious in an architectural sense, nor did it demand new techniques of construction." (C.T. 131).

(This error represents a regrouping of Appellant's points 3, 9 and 14.)

4. The District Court erred in treating the Pickrell invention as residing in a cofferdam, per se, instead of the admittedly novel combination set forth in the claims in suit (C.T. 128).

(This error represents Appellant's point 4.)

5. The District Court erred in finding, in effect, that the Coast Guard regulations, and particularly No. 32.60-10, dictated or rendered obvious the Pickrell invention set forth in the claims in suit (C.T. 129-130) and in finding and concluding the following with respect to the regulations;

- (a) the controlling reason for the inclusion of the V-shaped cofferdam in the Pickrell design was Coast Guard Regulations 32.60-10" (C.T. 130); and,

(b) although the cofferdam was without precedent in the industry, the cofferdam's form and location were, in view of prior developments in the industry, all but spelled out for Pickrell by the Coast Guard Regulations (C.T. 131)."

(This error represents a regrouping of Appellant's points 7, 10 and 15.)

6. The District Court erred in refusing to apply the doctrine of this Court in Twentier's Research, Inc., v. Hollister, Inc., 319 F.2d 898 (1963), to the facts of this case and to hold that the Coast Guard Regulations "created the problem, but did not provide the solution." (C.T. 130). (This error represents Appellant's point 8.)

7. The District Court erred when it found:

(a) "Admiral Murphy's testimony indicates that someone brought a device similar to the Pickrell patent to the Coast Guard's attention in 1957, long prior to the Pickrell invention." (C.T. 131); and,

(b) as related to the testimony of Admiral Murphy and the design of the device brought to the Coast

Guard's attention...there was nothing in the actions of the Coast Guard at the time of the review of this design that is in any way helpful to the plaintiff." (C.T. 131).

(This error represents a regrouping of Appellant's points 12 and 13.)

8. The District Court erred in failing to give Appellant the full value of the presumption of validity of the Pickrell patent under 35 U.S.C. §282 and in conceding the following to support its treatment of the presumption: "Although, as previously mentioned, the prior art not considered by the Patent Office would have added nothing material to that which was considered, each article of that art, would have added something to the evidence in this proceeding that the Pickrell design was obvious."

(C.T. 131). (This error represents a regrouping of Appellant's points 16 and 19).

9. The District Court erred in finding the Pickrell patent invalid. (This error represents Appellant's point 20.)

SUMMARY OF ARGUMENT

1. The evidence before the District Court did not establish, within the provisions of 35 U.S.C. §103, that the differences between the subject matter of the claims of the Pickrell patent in suit and the prior art are such that the subject matter as a whole would have been "obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

2. The District Court, erroneously, failed to test obviousness under 35 U.S.C. §103 on the basis of obviousness of conceiving the claimed combination.

3. The Coast Guard Regulations, at most, led to the creation of the problem solved by the Pickrell invention.

4. The District Court's treatment of Admiral Murphy's testimony as indicating "...that someone brought a device similar to the Pickrell patent to the Coast Guard's attention in 1957, long prior to the Pickrell invention" was clearly erroneous.

5. The District Court failed to give Appellant the full value of the presumption of validity of the Pickrell patent to which it is entitled under 35 U.S.C. §282.

6. The claims of the Pickrell patent here in suit are valid and infringed by the accused barges.

ARGUMENT

1. Obviousness under 35 U.S.C. §103

Before undertaking a review of the District Court's treatment of the Pickrell patent under this statute, it will be well to review the plain wording of the statute. The statute, in its entirety, reads as follows:

"§ 103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter as a whole and the prior art are such that the subject matter would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

Insofar as the instant suit is concerned, the key provision of this statute is believed to reside in its requirement that the "subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." (Emphasis supplied.) This provision requires that the claimed subject matter be considered as a "whole" and tested for obviousness as of the time the invention was made. The latter condition, in effect, forbids the employment of a hindsight test to determine obviousness.

While it is urged that the District Court erred in its application of the statute by treating the invention as residing in the cofferdam per se, rather than the claimed combination as a "whole", appellant relies primarily on the Court's treatment of the obviousness test for the error urged under 35 U.S.C. §103.

The obviousness test for the determination of patentable invention, and the admonishment of hindsight in the application of this test, has long been recognized in the Ninth Circuit, as evidenced by Patterson-Ballagh Corporation v. Perry M. Moss, et al, 201 F.2d 403, 96 USPQ 206 (1953). In the Patterson-Ballagh case, Judge Orr, speaking for the Court, commented:

"Hindsight tends to color the seeming obviousness of that which in fact is true contribution to prior art.";

and cited Diamond Rubber Co. v. Consolidated Rubber Tire Co.,

220 U.S. 428,435 (1911) for this now classic language:

"Knowledge after the event is always easy and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention."

The District Court here, while conceding "the fact that the Pickrell cofferdam was unprecedented" (C.T. 128) and admitting that "the Pickrell patent does a job which no prior design accomplished" (C.T. 124), chooses to rely on the, necessarily, hindsight testimony of the expert witnesses. This can be seen from its following conclusion (C.T. 128):

"The overwhelming weight of the expert testimony is that it would have been a fairly simple matter to modify the earlier devices or to combine features well known in the industry and long in use, and come up with a device following the Pickrell design."

The District Court reached this conclusion in spite of the fact that none of the experts called upon laid any claim to having seen

or conceived of the Pickrell invention prior to its making; and its own admissions as to the novelty and utility of the Pickrell invention, as are well summarized at C.T. 127, as follows:

"Certainly, the Pickrell design is 'new and useful.' It does 'increase the convenience' in loading and unloading the grain carrier, along with the petroleum products. It does 'extend the use' of vessels suited to carrying both cargoes, and it does 'diminish the expense' of the carriers, handlers and producers of those products. It did introduce a safety feature not found in other V-shaped grain carriers, but the same features were involved in Cuno."

The latter quote is taken from that portion of the District Court's Opinion relating to the decision in Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84, 51 USPQ 272 (1941), and the provisions of 35 U.S.C. §103, as interpreted in Graham et al, v. John Deere Co. of Kansas, et al, 383 U.S. 1, 148 USPQ 459 (February 21, 1966). In this portion the Court concluded (C.T. 127):

"The Pickrell device, ---- does not in the last analysis, portray anything beyond the work of one who was merely skilled in his calling."

It is submitted that in thus concluding the obviousness issue on the basis of the Graham decision, the District Court has failed

to apply the guidelines of the Supreme Court set forth in the Graham decision to the invention here under consideration. These guidelines may be found in that portion of the Graham decision quoted by the District Court at C.T. 129 and are here again quoted for the sake of emphasis:

"Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or unobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy. See Note, Subtests of 'Nonobviousness,' 112 U. Pa. L. Rev. 1169 (1964)."

The District Court's failure to apply the guidelines of the Supreme Court in the Graham decision is believed demonstrate in the following representation wherein the factual inquiries directed by the Supreme Court are applied to the Pickrell invention:

I. The scope and content of the prior art.

Here the prior art has been shown to contain: barges with single walled V-shaped cargo holds, as demonstrated, for example, by Barge R-76 (DX 37-2, 37-3); dual cargo barges with horizontal and/or vertical cofferdams, as demonstrated, for example, by the barge "Umatilla" (DX 53) and U.S. Patent 2,594,930 to Hudson (PX 6); and, the regulatory requirement that, under certain circumstances, cofferdams in a general sense be provided between specified classes of cargoes [see the United States Coast Guard "Rules and Regulations for Tank Vessels (PX 25)]. The prior art has not been shown to encompass within its scope, however, a

V-shaped cofferdam in a dual cargo vessel. This much is admitted by the District Court (C.T. 128).

II. The differences between the prior art and the claims at issue.

It is here noted that the claims measure the invention and that the claims in issue (1, 6, 8 and 11) each defines a dual cargo vessel having a V-shaped cofferdam adapted to separate a liquid cargo carried therebelow from a dry cargo carried thereabove and to facilitate the self unloading of the dry cargo. The prior art differs from the claims in issue in that it lacks the teaching of a barge having a V-shaped cofferdam or, for that matter, any teaching at all of a V-shaped cofferdam.

III. The level of ordinary skill in the pertinent art.

This has been aptly demonstrated by the testimony of the architect of the accused barges, Mr. Glosten, and the parade of Appellee's expert witnesses who followed him. Specifically, Mr. Glosten (called by the Appellant) testified that prior to Appellant's Barge 36 he had never seen a V-shaped cofferdam (R.T. 280-281). Appellee's expert witnesses made similar admissions [see, for example, the testimony of Mr. Spaulding (R.T. 313)]. It is also significant that neither Mr. Glosten, nor Appellee's expert witnesses, laid any claim to having conceived the concept of a barge having a V-shaped cofferdam before having been alerted to the invention of the

patent in suit. Their con-
ceptions of what was obvious
were all made in "hindsight"
fashion.

Against the background demonstrated by the above analysis; the aforementioned concession and admissions of the District Court; and the established treatment of the obviousness test by this Court, Patterson-Ballagh Corporation v. Perry M. Moss, et al, supra, it is believed clear that the Appellee has not established that the Pickrell invention defined by the claims here in suit would have been obvious within the provisions of 35 U.S.C. §103. Accordingly, it is respectfully urged that the District Court erred in finding the claims invalid on the basis of this statute.

2. The District Court's Test of Obviousness

It has long been recognized that every inventive act involves a twofold process, namely:

1. the conception of an idea by the inventor;
and,
2. the application of that idea to the production of a practical result.

"Neither of these elements is alone sufficient. An unapplied idea is not an invention. The application of an idea, not original with the person who applies it, is not an invention. Hence, the inventive act in reality consists of two acts; one mental, the conception of an idea, the other manual, the reduction of that idea to practice." I ROBINSON, THE LAW OF PATENTS FOR USEFUL INVENTIONS §77 (1890).

The Courts have recognized the twofold characteristic of invention and that patentable inventions may, in effect, reside in conception. In this regard, the Court's attention is here directed to the case of In re Hult, 162 F.2d 476, 74 USPQ 158 (C.C.P.A. 1947) wherein the Court of Customs and Patent Appeals commented:

"The rule has been so often stated, and is so well understood as to call for no citation of authorities that the assembling into a new article of a number of good features of the prior art may involve invention and be of such utility and produce such unexpected results as to be patentable. The conception of a structure of that character may be the invention, even though the assembly of it into a united structure would involve little more than mechanical skill after such invention." (Emphasis supplied.)

The underlined portion of the above quotation also makes it clear that the mere fact that an invention, once conceived, was readily reduced to practice does not render the invention unpatentable.

Attention is here also invited to the following decisions and comments of the Courts therein which recognize the significance of conception in the determination of patentable invention:

Zysset v. Popeil Brothers Inc., 276 F.2d 354, 124 USPQ 250 (C.A. 7, 1960) certiorari denied 364 U.S. 826, 127 USPQ 555

"A novel idea was incorporated. While it took mechanical skill to adapt the idea to practical use, and although the mechanics employed may have been obvious, the idea was not. It possessed the 'impalpable something which distinguishes an invention from simple mechanical skill'."

In re Fay and Fox, 347 F.2d 597, 146 USPQ 47,48 (C.C.P.A. 1965)

"Such a composition of matter is a new combination. It is necessary, therefore, to consider such a combination as an entity which embodies the invention for which a patent is sought. In other words, it is necessary to consider the invention 'as a whole', i.e., the mental conception of the invention as well as its embodiment in a particular composition of matter. 'A patentable invention is a mental result. *** The *** product is but its material reflex and embodiment.'

Smith v. Nichols, 88 U.S. (21 Wall.) 112 (1874)."

It is urged that the District Court failed to consider the Pickrell invention "as a whole" as required by 35 U.S.C. §103 in that it failed to test obviousness under the statute on the basis of both the conception of the idea involved and the application or reduction of this idea to practice. The District Court, rather, tested obviousness only on the latter condition. This is believed evident from the fact that the Court had before it no evidence showing or suggesting the conception of a V-shaped cofferdam, or a barge incorporating such a cofferdam, prior to the Pickrell invention; and that the Court laid great weight on its conclusion that "the plaintiff's witnesses practically conceded that there was nothing unusual or unique in the problems of engineering or construction presented by the Pickrell device." (C.T. 127-128). Appellant takes no issue with the District Court's conclusion regarding the problems of engineering or con-

struction presented by the Pickrell device, but it does dispute the validity of the District Court's judgment insofar as it failed to take into account and give proper weight to the conception of the Pickrell idea in determining the applicability of 35 U.S.C. §103.

3. The Significance of the Coast Guard Regulations

The District Court has found, in effect, that the Coast Guard Regulations, and particularly No. 32.60-10, dictated or rendered obvious the Pickrell invention set forth in the claims in suit (C.T. 129-130). This finding was based on the premise that, considering the state of the art, the existence of the Coast Guard Regulations requiring cofferdams between juxtaposed cargo holds to permit the vessel to carry dual cargoes of certain specified characteristics all but spelled out the Pickrell invention. The obvious shortcoming of this premise is that, while the prior art and Coast Guard Regulations may have indicated a problem, they did not teach Pickrell's solution to this problem.

In these respects, the situation in the case here under consideration parallels that in Twentier's Research v. Hollister, 319 F.2d 898, 138 USPQ 473 (C.A. 9). There the patent in suit related to an identification means for use on patients in hospitals and other institutions. The District Court in the Twentier's case made a finding (15) that a suitable identification means for such use is one which meets a criteria which was specified. The finding, however, included this observation:

"These criteria created the problem, not the solution."

In a further finding in the Twentier's case, quoted in the decision of the Court of Appeals, namely Finding No. 20, the District Court found that the identification means disclosed in the patent met the criteria it had set forth and solved the problem. Nevertheless, it held the patent valid and infringed. The Court of Appeals, in affirming, took note of the standard of invention recited in the controlling cases and observed:

"It is not a difficult task to discern the foregoing indicia of inventiveness in the present patent. What is the 'something' which the combination of all elements in this patent contributes to the art, and renders the 'whole' more than the 'sum of its parts'? It works. None of the prior devices did."

In refusing to apply the doctrine of the Twentier's case to the instant suit, the District Court commented as follows (C.T. 130-131):

"... Plaintiff's argument might have some merit if there was evidence or logic in its support. The overwhelming weight of credible evidence is to the effect that there is nothing unique, novel or extraordinary in the design of a V-shaped cofferdam. For that matter, the Court could well take judicial notice of that fact. Certainly the creation of such a V-shaped design would not require more ingenuity than that possessed of a mechanic skilled in the art."

From these comments it must be concluded that, in an effort to avoid the doctrine of the Twentier's case, the District Court has overlooked the very "evidence" which it proclaims was lacking in plaintiff's argument. Specifically, in concluding that there is nothing unique, novel or extraordinary in the design of a V-shaped cofferdam, the District Court has ignored its own concession succinctly set forth in the Opinion at C.T. 128 as follows:

"To be conceded, is the fact that the Pickrell cofferdam was unprecedented and was quickly imitated.---"

It is thus respectfully urged that the District Court has fallen prey to the same faulty reasoning pattern evidenced by the testimony of Appellee's experts at trial. Namely, once given the conception of providing a barge with a V-shaped cofferdam, it then appears impossible that the creation of the conception could have involved invention. Nevertheless, the weight of the credible evidence, by the total absence therefrom of any teaching or suggestion of the conception, points to the inescapable conclusion that the creation of the conception must, in fact, have been unobvious at the time the invention was made within the provisions of 35 U.S.C. §103.

4. The District Court's Characterization of Admiral Murphy's Testimony

Admiral Murphy's testimony, concerning a device that someone brought to the Coast Guard, related to a barge having a single W-shaped bulkhead separating adjacent cargo holds (DX 51-2). This device included no W- or V-shaped cofferdam and, thus, was no more similar to the invention of the Pickrell patent than the art of record before the Patent Office, such as U.S. Patent No. 754,107 to Wolvin (PX 6). The single nature of the W-shaped bulkhead disclosed in the device referred to in Admiral

Murphy's testimony is evident from observation of the sketch forming part of DX 51-2 and following comments found in the Coast Guard memorandum forming part of the exhibit:

"Accordingly, it is recommended that if the proposed design is formally submitted to the Coast Guard, it be approved only if a cofferdam is provided in the way of the deck depressions."

From this quotation it is clear that the device under consideration by the Coast Guard was lacking of a cofferdam similar to that of the Pickrell invention. Accordingly, the District Court's characterization of this testimony (C.T. 131) as indicating "that someone brought a device similar to the Pickrell patent to the Coast Guard's attention in 1957, long prior to the Pickrell invention" was clearly in error, if it was intended to mean that this device was more similar to the Pickrell invention than the record art before the Patent Office in the prosecution of the Pickrell patent.

With respect to the preceding quotation from the Coast Guard memorandum, it is noted that no reference is made as to how a cofferdam might be provided "in the way of the deck depressions" or what shape such a cofferdam might have. Thus, the memorandum

can be given no more weight than the Coast Guard Regulations, since, although it points out the cofferdam requirement, it does not suggest the form of cofferdam embodied in the invention defined in the claims of the Pickrell patent in suit.

It is here noted that DX 51-2 must be treated as expert testimony, rather than prior art. This results because, by Admiral Murphy's testimony (R.T. 320), Coast Guard files of the nature of this exhibit are not available to anyone other than the man who submitted them.

5. The Presumption of Validity

The Pickrell patent in suit, No. 3,033,150, is, of course, presumed valid. The Statute (35 U.S.C. §282) so provides in this language:

"A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it."

The characterization of the burden has not materially changed since it was declared with emphasis by Chief Justice Hughes, in Mumm v. Joseph Z. Dicker & Sons, 301 U.S. 168, 33

USPQ 247, as a heavy one. This language was employed:

"The issue of the patent is enough to show, until the contrary appears, that all the conditions under which a discovery is patentable in accordance with the statutes have been met. Hence, the burden of proving want of novelty is upon him who avers it. Walker on Patents, Sec. 116. Not only is the burden to make good this defense upon the party setting it up, but his burden is a heavy one, as it has been held that 'every reasonable doubt should be resolved against him' Id., Cantrell v. Wallick, supra; Coffin v. Ogden, 18 Wall. 120, 124; The Barbed Wire Patent, 143 U.S. 274, 284, 285; Adamson v. Gilliland, 242 U.S. 350, 353."

This Court, even after the enactment of the Patent Act of 1952, followed the rule of the Mumm case, supra. In Patterson-Ballagh Corporation v. Moss, et al, supra, Judge Orr, speaking for the Court, had this to say:

"Appellants had the burden of proof on the question of the validity of the Moss Patent since a presumption of validity arises from the issuance of a patent. Mumm v. Jacob E. Decker & Sons, 301 U.S. 168, 171 (1937). Radio Corporation of America v. Radio Engineering Laboratories, Inc., 293 U.S. 1, 7 (1934). Reasonable doubts must be resolved in favor of the validity of the patent. The presumption created by the action of the Patent Office is the result of the expertness of an administrative body acting within its specific field and can be overcome only by clear and convincing proof. The District Court found that the appellants had not met this burden of proof. It did not err."

The District Court here has carefully compared the prior art considered by the Patent Office in the prosecution of the application which matured into the Pickrell patent with the teachings of the prior art devices which have been urged by Appellee at trial and has concluded (C.T. 123):

"I find that the submission of the teachings of these devices would not have materially added to the prior art which was actually considered by the Patent Office during the course of prosecution of the Pickrell Patent."

The Court, however, chose to overthrow the presumption of validity afforded the Pickrell patent under 35 U.S.C. §282 in its following treatment of the presumption (C.T. 131):

"Although, as previously mentioned, the prior art not considered by the Patent Office would have added nothing material to that which was considered, each article of that art, would have added something to the evidence in this proceeding that the Pickrell design was obvious."

Thus, while conceding that the art urged by the Appellant would not have added materially to that before the Patent Office, the District Court has overthrown the presumption of validity attaching to the Pickrell patent on the nebulous, and apparently inconsistent reasoning that this art added "something" indicating that the Pickrell design was obvious. It is respectfully submitted

that in so overthrowing the presumption of validity the Court has gone directly contrary to the dictates of 35 U.S.C. §282 and the established treatment of the presumption set forth in the Mumm and Patterson-Ballagh cases, supra, requiring that, in considering the presumption, "reasonable doubts must be resolved in favor of the validity of the patent."

6. Validity and Infringement

As previously mentioned herein at pages 11 to 14, the District Court's judgment of invalidity was based solely on an application of 35 U.S.C. §103 to the claims of the Pickrell patent in suit. In its application of Section 103 the Court, in effect, expressly overthrew the presumption of validity attaching to the claims under 35 U.S.C. §282. On the basis of the foregoing sections of this argument, it is respectfully submitted that the District Court erred in thus treating the patent; and that the claims of the patent here in suit are, in fact, valid.

If the claims in suit are valid, then there is no question that they are infringed by Appellee's accused devices. This has been spelled out by the District Court in its following finding at C.T. 132, as follows:

"If the Pickrell patent is declared valid, then I would have no hesitancy in holding that defendant's barges, built, converted and operated by defendant infringed Claims 1, 6, 8 and 11, of the patent in suit in the specifications as set forth in paragraph 2, subdivisions (a), (b), (c) and (d) on pages 8 and 9 of the pre-trial order; that the acts of infringement were knowingly, willfully and wantonly committed and that plaintiff would be entitled to injunctive relief against further infringements."

CONCLUSION

The District Court, in closing its Opinion, commented as follows (R.T. 132-133):

"Although adding no weight to my findings or conclusions, I must say that my sympathies are entirely with the plaintiff's position. It seems unfair that the patentee is not entitled to the benefit of putting together what might be termed a jigsaw puzzle and making it work. It would seem that he should be deserving of more than applause for a job well done."

It is respectfully submitted that the patentee is, indeed, deserving of more than applause and that, for the reasons set forth in the foregoing argument, the judgment should be re-

versed and the case should be remanded to the District Court for entry of judgment in favor of Appellant.

Respectfully submitted,

JOHN R. GILBERTSON
JAMES M. NAYLOR
JOHN K. UILKEMA
Counsel for Appellants

By *James M. Naylor*

CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

James M. Naylor

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the foregoing APPELLANT'S OPENING BRIEF have this 6TH day of September, 1966 been sent by first class air mail to Mr. John Gordon Gearin, 800 Pacific Building, Portland, Oregon 97207, the principal attorney for Appellee.

James M. Naylor

A P P E N D I X

I

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RPTZ-PATCO, INC.,)	
)	
Appellant,)	
)	
v.)	NO. 21005
)	
PACIFIC INLAND NAVIGATION)	
COMPANY, INC.,)	
)	
Appellee.)	

APPELLANT'S STATEMENT OF
POINTS ON APPEAL

The following are the points on which Appellant,
RPTZ-PATCO, INC., intends to rely on this appeal:

1. The Trial Court erred in concluding that "the subject matter of Pickrell and the prior art, including the Coast Guard Regulations, was such that the subject matter as a whole would have been obvious at the time the invention [sic "was made"] to a person having ordinary skill in the art to which

said subject matter pertained."

2. The Trial Court erred in concluding that the "Pickrell device, when viewed in the light of the decision in Cuno, and the provisions of 35 U.S.C. §103, as interpreted in Graham v. John Deare Co., supra, does not, in the last analysis portray anything beyond the work of one who was merely skilled in his calling."

3. The Trial Court erred in concluding that the overwhelming weight of the expert testimony was that it would have been a fairly simple matter to modify the earlier devices or to combine features well known to the industry and long in use, and come up with a device following the Pickrell design.

4. The Trial Court erred in treating the Pickrell invention as residing in a cofferdam, per se, instead of the admittedly novel combination set forth in the claims in suit.

5. The Trial Court erred in applying a purely "hindsight" test of obviousness to the Pickrell invention.

6. The Trial Court erred in accepting and relying upon the "hindsight" testimony of Appellee's expert witnesses as a basis for a holding of invalidity of the Pickrell patent because of asserted obviousness under 35 U.S.C. §103.

7. The Trial Court erred in finding, in effect, that the Coast Guard Regulations, and particularly No. 32.60-10, dictated or rendered obvious the Pickrell invention set forth in the claims in suit.

8. The Trial Court erred in refusing to apply the doctrine of the decision of this Court in Twentier's Research, Inc. v. Hollister, Inc., 319 F(2d) 890 (1963), to the facts of this case and to hold that the Coast Guard Regulations "created the problem, but did not provide the solution".

9. The Trial Court erred in finding that "the overwhelming weight of the credible evidence is to the effect that there was nothing unique, novel or extraordinary in the design a V-shaped cofferdam" and that the Court could well take judicial notice that such was the fact.

10. The Trial Court erred in concluding that "the controlling reason for the inclusion of the V-shaped cofferdam in the Pickrell design was Coast Guard Regulation 32.60-10".

11. The Trial Court erred in concluding that "the creation of such a V-shaped design would not require more ingenuity than that possessed of a mechanic skilled in the art".

12. The Trial Court erred when it found that "Admiral Murphy's testimony indicates that someone brought a device similar to the Pickrell patent to the Coast Guard's attention in 1957, long prior to the Pickrell invention".

13. The Trial Court erred in finding that there was nothing in the actions of the Coast Guard, as related in the testimony of Admiral Murphy, at the time of the review of the design forming the subject matter thereof, that is in any way helpful to the plaintiff.

14. The Trial Court erred in finding, on the entire record, that the Pickrell device presented nothing which was not obvious in an architectural sense, nor did it demand new techniques of construction.

15. The Trial Court erred in finding and concluding that although the cofferdam was without precedent in the industry, the cofferdam's form and location were, in view of prior developments in the industry, all but spelled out for Pickrell by the Coast Guard Regulations.

16. The Trial Court erred in conceding that although the prior art considered by the Patent Office would have added nothing material to that which was considered, each item of the art would have nevertheless added something to the evidence in this proceeding that the Pickrell design was obvious.

17. The Trial Court erred when it concluded, from Pickrell's testimony, that "the Russell Barges and the Russell Patent made obvious every feature of his design, with the exception of the cofferdam".

18. The Trial Court erred in holding the claims in issue invalid when it tested obviousness under 35 U.S.C. §103 on the basis of the engineering problems which would be involved in constructing the claimed structure rather than, correctly, on the basis of the obviousness of conceiving the claimed combination.

19. The Trial Court erred in failing to give Appellant the full value of the presumption of validity of the Pickrell

patent and in failing to recognize that Appellee had not sustained its burden of proof.

20. The Trial Court erred in finding the Pickrell patent invalid.

JOHN R. GILBERTSON
JAS. M. NAYLOR
JOHN K. UILKEMA

By *J. K. Uilkema*
Attorneys for Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing APPELLANT'S STATEMENT OF POINTS ON APPEAL has been served upon Appellee by mailing copies thereof to its attorney, John Gordon Gearin, Esquire, 800 Pacific Building, Portland, Oregon 97207, this 21st day of July, 1966.

J. K. Uilkema
JOHN K. UILKEMA

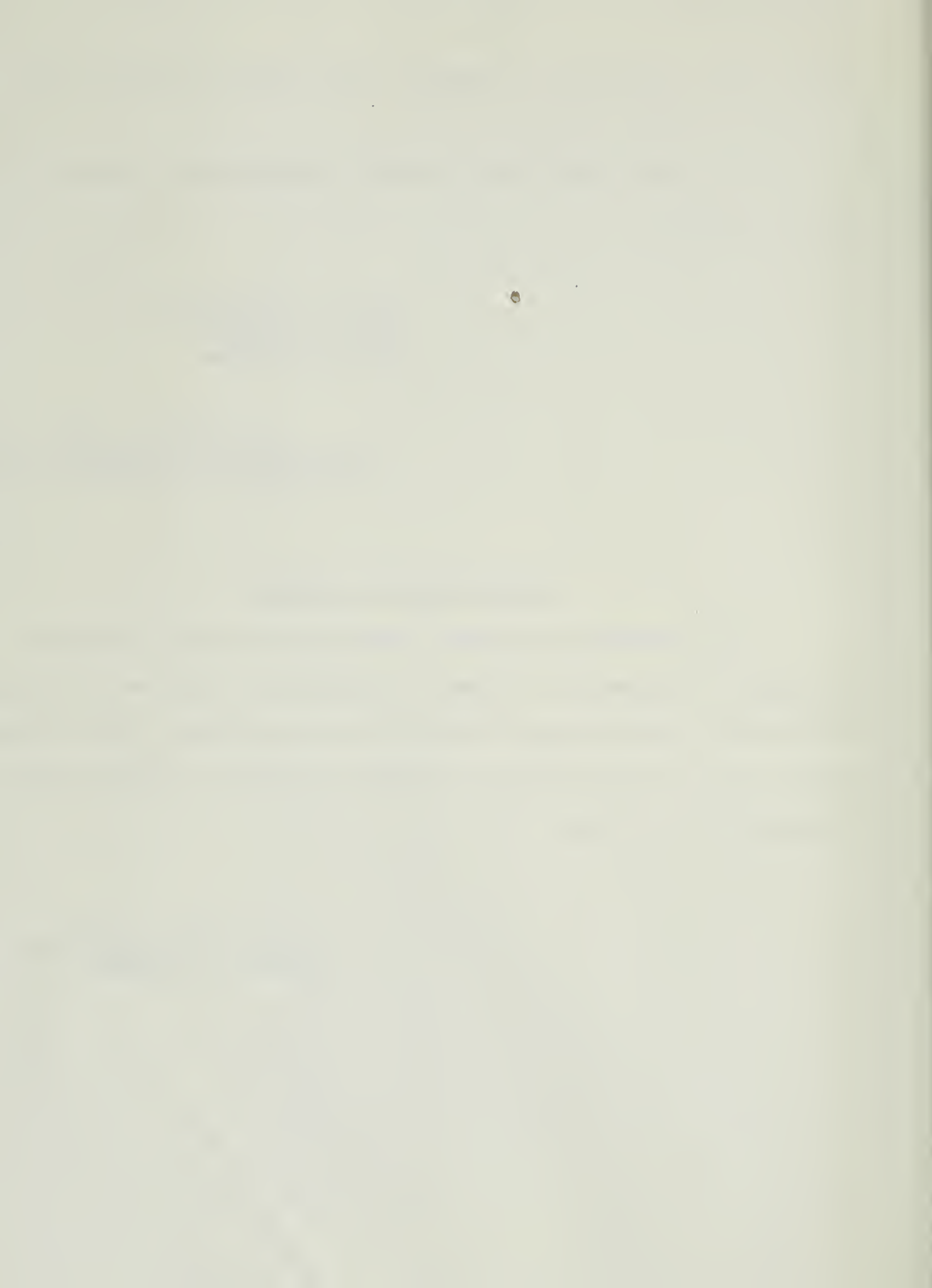


TABLE OF EXHIBITSPLAINTIFF'S EXHIBITS

<u>NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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PLAINTIFF'S EXHIBITS (Continued)

<u>EX NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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Although this Exhibit was identified as "Rules and Regulations" in the Clerk's record of Exhibits, it is not clear from the Reporter's Transcript where it was offered and received.

DEFENDANT'S EXHIBITS

<u>NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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From the Reporter's Transcript, it is not clear where these Exhibits were received.

DEFENDANT'S EXHIBITS (Continued)

<u>NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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A-4K	*3	*3	*3	
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DEFENDANT'S EXHIBITS (Continued)

<u>NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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5B	R.T. 419	419	419	

From the Reporter's Transcript the exact identity of these Exhibits and where they were offered and received is not clear. It appears that these Exhibits form part of the Exhibits in the Deposition of Lew Russell Sr. identified in the Pretrial Order as Defendant's Exhibit 47.

Although this Exhibit was identified as "Rules and Regulations" in the Clerk's record of Exhibits, it is not clear from the Reporter's Transcript where it was offered and received

DEFENDANT'S EXHIBITS (Continued)

<u>EXHIBIT NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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From the Reporter's Transcript, it is not clear where these Exhibits were offered and received.

